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No. 04-340

In The

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners, and has filed letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO RECOVER FOR THE INJURY SUFFERED BY THEM WHEN THEY ARE FACED WITH WRONGFUL EXACTIONS

The NAHB represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that allows essentially unreviewable exactions to be imposed on new development, and then effectively strips the federal courts of any role in the judicial review process.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

SUMMARY OF THE ARGUMENT

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a claim that governmental action had resulted in a regulatory taking, in violation of the Fifth and Fourteenth Amendments, was not ripe for review until the claimant had first sought just compensation using state provided procedures. The application of *Williamson County* by the lower federal courts has lead some courts – such as the Ninth Circuit in the case at bar – to effectively prohibit a regulatory taking claim from ever being heard by any federal court. Other Courts of Appeals, such as the Second Circuit in *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir.), *cert. denied*, 125 S. Ct. 14 (2004), have taken a completely opposite position. The combination of the diametrically opposed positions of the

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2 The Court's opinion cited the NAHB's brief. (483 U.S. at 840.)

Second and Ninth Circuits, and the role that the federal courts should play in forming the law of regulatory takings, argues strongly that this Court should consider whether the policy set forth in *Williamson County* should be revisited.

Further, the reach of this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held that a municipality must justify the imposition of an exaction as a condition of a land use approval by demonstrating a "rough proportionality" between the impact caused by the new development and the exactions imposed to mitigate it, has lead to substantial confusion among lower courts throughout the nation.

The reach of both *Williamson County* and *Dolan* have a substantial impact on the ability of American developers to deliver affordable housing. The grant of this Court's writ of *certiorari* to clarify the application of those cases is sorely needed.

ARGUMENT

I.

THE PROCEDURE MANDATED BY *WILLIAMSON COUNTY* DESPERATELY NEEDS FIXING

The petitioners have pointed out the problems which have arisen as a result of this Court's decision in *Williamson County*. (Petition at 6–10). The language used by the petitioners doesn't begin to match that used by the commentators who have derided the problems spawned by *Williamson County* as "worse than mere chaos,"[3] "absurd,"[4]

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3 Robert H. Freilich, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 (1999).

4 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997).

"nonsense,"[5] "riddled with obfuscation and inconsistency,"[6] a "Kafkaesque maze,"[7] and "a fraud or hoax on landowners,"[8] just to name a few.

As discussed by the petitioners, this Court is faced with a clear split amongst the Circuits on the question of whether claim preclusion (collateral estoppel) can be avoided by a landowner who makes a reservation in state court of the right to have a subsequent federal court decide federal takings claims, a procedure analogous to that authorized in the abstention context by *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964); (Petition at 6-10).

Put another way, can a takings claim ever be decided by a federal court? The Sixth Circuit recently expressed its understanding that this Court had not intended to always preclude federal court review of Fifth Amendment takings claims:

> "In the takings realm, where *Williamson County* prong-two ripeness combined with res judicata law would otherwise bar all federal takings claimants from the door of the district court – a result clearly not contemplated by the Court in *Williamson County* – this sort of extension of *England* to unwilling state court litigants is necessary to avoid grave unfairness." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004).

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5 Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County*, in *Taking Sides on Takings Issues: Public and Private Perspectives* 480 (Thomas E. Roberts, ed., A.B.A. 2002).

6 Testimony of Professor Daniel R. Mandelker before the Judiciary Committee, U.S. House of Representatives, *reprinted in* 31 Urb. Law. 195 at 234, 236 (1999).

7 Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992).

8 Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

At the very least, the ripeness elements of *Williamson County* have resulted in substantial delays before a federal court hears a takings case. If the Court of Appeals' decision in the case at bar is allowed to stand, then *Williamson County's* state procedure requirement will be transmitted into an outright denial and no federal court in the Ninth Circuit will ever hear a federal takings claim. If that is what this Court contemplated in *Williamson County*, then it should say so.

II.

PROPERTY CAN BE WRONGLY TAKEN THROUGH A LEGISLATIVELY IMPOSED EXACTION AS EASILY AS IT CAN THROUGH AN AD HOC ADMINISTRATIVE DECISION

A. This Court Has Recognized That A Legislative Act Can Result In A Taking

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. See, *e.g.*, *Babbitt v. Youpee*, 519 U.S. 234 (1997), which, for a second time, following *Hodel v. Irving*, 481 U.S. 704 (1987), held the escheat provision of the Indian Land Consolidation Act, 25 U.S.C. § 2206, unconstitutional. See also the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which held that the application of the Coal Industry Retiree Health Benefit Act of 1992, 2 U.S.C. §§ 9701-9722, was unconstitutional insofar as it made the plaintiff liable for millions of dollars in contributions to fund health care benefits based on its predecessor company's activities decades earlier.

B. *Dolan* Itself Involved A Legislatively Imposed Exaction

Dolan is the case which has given rise to the question now before this Court: whether a legislatively imposed exaction is entitled to more deference than one imposed through an ad hoc administrative proceeding. However, *Dolan* did not involve an ad hoc decision; it merely applied the required dedication standards set forth in Tigard's Community Development Code ("CDC"):

> "The CDC required property owners in the area zoned Central Business District to comply with a 15 per cent open space and landscaping requirement, ... The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan." 512 U.S. at 377-378.

Nevertheless, footnote 8, on page 391 states:

> "Here, by contrast, the City made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."

Justice Souter, in his dissent, pointed out that footnote 8 misstated the genesis of the condition:

> "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, *ante*, at 391, n. 8, but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

Thus, the predicate for the numerous decisions which turn on the manner in which an exaction has been imposed – legislative or administrative – is not justified by

the facts of the very case cited as the basis for the dichotomy.

III.

THE CHARACTERIZATION OF GOVERNMENTAL ACTION AS LEGISLATIVE VS. ADMINISTRATIVE HAS PROVED TO BE UNWORKABLE

As subsection II. B, *supra*, points out, it is difficult to determine just when a particular action should be characterized as legislative as opposed to administrative, particularly in the land use context. In *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004), the Texas Supreme Court found that a requirement in the Town's municipal code, which required that a developer replace a perfectly good asphalt road with a more expensive concrete road (notwithstanding the fact that the development did not create the need for the replacement), constituted a compensable taking. In doing so, the Court replied to the Town's argument that *Dolan* applied only to adjudicative decisions. After rejecting the argument, the Court stated:

> "Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative. ..." 135 S.W.3d at 641.

For example, state courts are split on whether a rezoning is always a legislative act. California holds that the rezoning of a single parcel of land, "whatever the size of the parcel affected," is a legislative act. *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565, 567 (Cal. 1980). California is in the majority; however, there are a substantial number of states which hold that the rezoning of small parcels of property are to be reviewed as administrative acts. 3 Arden H. Rathkopf, *The Law of Zoning and Planning*, Ch. 40, *Rezonings: Substantive Validity and Standards for Judicial Review*, §§ 40: 18-25,

Rezonings as Quasi-Judicial Acts: Standards of Judicial Review (2004).

In *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), the Court of Appeals held that the rezoning of the plaintiff's .75 acre site by a California County was so individualized, and had such a specific impact on the plaintiff, that the failure to give the plaintiff notice and an opportunity to be heard before the rezoning – which came about, in part, because of the importunings of a local city council member – violated the plaintiff's right to substantive due process.

> "In determining when the dictates of due process apply, however, we find little guidance in formalistic distinctions between 'legislative' and 'adjudicatory' or 'adjudicative' government actions." 904 F.2d at 501.

Harris was followed in *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-897 (6th Cir. 1991), on very similar facts.

See also *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003), where the County's Development Ordinance required a minimum 60 foot right of way in connection with a subdivision which would end up in a private road serving four or more parcels. 69 P.3d at 753, n. 4. The County, relying on *Dolan*'s requirement of rough proportionality, decided not to impose the requirement because the burden of doing so would be far out of proportion to the impact caused by the development approval sought by the landowner based. 69 P.3d at 754. The Oregon Court of Appeals recognized that the County's Development Ordinance applied broadly but found discretion – not contained in the Ordinance – which took the County's decision out of the legislative realm. Fairly read, *Dudek* is actually a legislatively imposed exaction which the court felt went too far.

These are but a few of the many cases which demonstrate the difficulty of determining whether, and in what situations, *Dolan* applies.

IV.

LEGISLATIVELY IMPOSED EXACTIONS CAN BE EASILY IMPOSED ON "OTHERS"

The petitioners have quoted Justice Thomas's dissent, joined by Justice O'Connor, to the denial of *certiorari* in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995), which pointed out that "[a] city council can take property just as well as a planning commission can." (Petition at 11.) Implicit in this argument is the understanding that it is both tempting – and easy – to impose a cost on a small number of individuals particularly if, as is so often the case in residential development, the payor is an out-of-town corporation which doesn't even have a vote. The courts of California have recognized the unfairness of this situation in an analogous context.

In *California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall School Dist.*, 253 Cal. Rptr. 497 (1988), the Court of Appeal held that a voter approved "special tax," imposed only on new development, was actually a development fee which was invalid because it exceeded the state mandated limit.

> "Section 4 [of Art. XIIIA of the California Constitution] provides that the special taxes imposed by cities, counties and special districts must be imposed 'on such district.' For the reasons discussed below, we interpret this directive language to preclude taxes which the electorate impose on others and not directly on themselves ...." 253 Cal. Rptr. at 511.

The Court of Appeal was simply not going to allow the voters to approve a tax which could never be imposed on the voters themselves.[9]

> "To adopt the school districts' interpretation of the phrase 'on such district' would allow the absurd consequence affected by the voters in the instant case – overwhelming passage of a 'tax' which they themselves do not have to pay, either directly or indirectly." 253 Cal. Rptr. at 512 (footnote omitted).

Immunizing legislatively imposed exactions from the rough proportionality requirement imposed by *Dolan* allows the majority *carte blanche* to require a developer – not you, not me, but the man behind the tree[10] – to pay for problems which new development did not create.

V.

THE PETITIONERS HAVE UNDERSTATED THE NUMBER OF DECISIONS WHICH HAVE WRESTLED WITH THE APPLICATION OF *DOLAN*

The petitioners cite a number of cases which have held that *Dolan* either does, or does not, apply to

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9 The "special taxes" would be imposed "*only* upon *new* units of residential development. In fact, the voter pamphlet material, as well as the proponents' advertising soliciting a 'yes' vote, repeatedly emphasized that existing residents would not be assessed or required to pay the special taxes." 253 Cal. Rptr. at 500, n. 4 (italics in the original).

10 Russell Long, former chairman of the Senate Finance Committee explained the difficulty associated with tax reform because of the philosophy "Don't tax you, don't tax me, tax that fellow behind the tree." Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 401 (Oxford Univ. Press 1993) (quoting from *Forbes*, Dec. 15, 1976).

legislatively imposed exactions. (Petition at 10 - 12.) The petitioners have not, however, exhausted the field. This is particularly true in California where, on one day, one Court of Appeal decided three cases, all on the basis that rough proportionality did not apply to legislatively imposed exactions. *Agencia la Esperanza Corp., Inc. v. Orange County Bd. of Supervisors*, 2002 WL 681798 (Cal. App. 2002), *cert. denied*, 538 U.S. 916 (2003); *Extra Space of Laguna Hills v. City of San Clemente*, 2002 WL 700930 (Cal. App. 2002); and *Extra Space of Laguna Hills v. San Joaquin Hills Transp. Corridor Agency*, 2002 WL 683835 (Cal. App. 2002). The three cases together involved roughly $1,250,000.

Other cases holding that *Dolan* does not apply to legislatively imposed exactions include *Wonders v. Pima County*, 89 P.3d 810, 816 (Ariz. Ct. App. 2004); *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 588 S.E.2d 694, 697 (Ga. 2003); *Homebuilders Ass'n v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Or. Ct. App. 2003); *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60, 65 (2001), *cert. denied*, 535 U.S. 954 (2002); and *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

On the other hand, the Court in *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Ct. App.), *appeal denied*, 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996), held that there is no reason to differentiate between exactions imposed legislatively or adjudicatively.

See also, *Note, the Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242 (2000), which reviewed 29 cases involving *Dolan* and concluded:

> "The survey of the caselaw reveals that the lower courts' application of the legislative/ adjudicative distinction is inconsistent." 75 N.Y.U. L. Rev. at 256.

VI.

EXACTIONS HURT AFFORDABLE HOUSING

The question of just how much a developer is required to pay is more than academic; it directly affects the ability and willingness of developers to provide badly needed housing.

Economists may argue over just who bears the incidence of exactions – the homebuyer, the developer, or the landowner who sells to the developer – but there is no question that there is an impact. James C. Nicholas *et al.*, *A Practitioner's Guide to Development Impact Fees* 61-68 (1991). Moreover, there is a general consensus that it is the homebuyer who ends up paying for exactions in the long run. Alan A. Altshuler & José A. Gómez-Ibáñez, *Regulations for Revenue: The Political Economy of Land Use Exactions* 98 (1993); *Development Exactions* 55 (Frank & Rhodes, eds. 1987); and Snyder & Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* 100 (1986).[11]

> "Through various fees and assessments, as well as requirements for offsite improvements, communities can force developers to pay for infrastructure and public services associated with new development. Using their power to regulate land use, localities have gradually shifted the burden of supplying such infrastructure and services from the community at large to developers. Developers pass the costs along to new

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11 Research by the NAHB shows that the average building company makes a net profit of only 5.4% before taxes. NAHB, *Cost of Doing Business: The Business of Building – Measuring Your Success* 7 (2004). Given the narrow profit margin, builders pass on as much of the cost of exactions to house buyers as possible.

> homebuyers, in some cases adding substantially to the total cost of new housing.
>
> "Impact fees are regressive because they are assessed on a per-unit basis, rather than as a percent of the value of the home. Those who depend on affordable housing are forced to absorb fees that are a substantial percentage of the sales price of any home they purchase. For example, exactions, dedications, and fees account for as much as 30 percent of the cost of housing in New Jersey.
>
> "One consequence of high fee schedules is that developers opt to build housing only for the higher end of the single-family market where fees can be absorbed more easily as a proportion of sales price. Another consequence may be that developers prefer to construct single-family as opposed to multi-family projects. According to a recent Urban Land Institute study, it is easier for developers to pass the fees along to homebuyers than to renters. This preference can have a particularly dampening effect on the development of multifamily housing and may be partially responsible for the fact that the multifamily share of all housing starts declined by 10 percentage points between 1985 and 1989. Those who depend on more affordable housing are clearly disadvantaged when new development shifts to the upper income single-family end of the market." "*Not In My Back Yard*", *Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, 2-10-11 (1991) (footnotes omitted).

The statements contained in "*Not In My Back Yard*" are as true today as they were in 1991.

"• California development fees are extremely high. Single-family homebuilders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of a sample of 89 cities and counties. Owners of new infill homes paid an average of $20,327 per unit. Apartment developers paid an average of $15,531 per new apartment unit.

* * *

"• Fee-setting is not routinely linked with capital improvements planning. Local capital facilities fees are usually determined using an average cost methodology, *e.g.*, historical or projected capital costs are divided by the current or projected future population to yield a per capita or per household cost. As a result, the link between fees and longterm capital improvements programming (assuming such activities take place) is typically a weak one.

"A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to the higher housing prices, especially during periods of high housing demand. Among the key findings of the research in this area:

"• California's high residential development fees significantly contribute to its high housing costs and prices. Among the sample of California jurisdictions, fees account for an average of ten percent of the median price of new single-family homes.

"• The contribution of fees to home prices is greatest in affordable markets. Among individual communities in the sample, development fees accounted for less than five percent of new home prices in expensive communities. At the opposite end of the price spectrum, fees accounted for more than 15 percent of new home prices in many jurisdictions that provide a significant share of their respective region's affordable housing – making the fee issue all the more significant." Landis, Larice, Dawson & Deng, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999*, 2-3 (2001), prepared for the Division of Housing Policy Development of the California Department of Housing and Community Development.[12]

The bottom line is that California alone is going to have to produce an average of 220,000 housing units every year until 2020 just to keep up with the expected growth in population. Landis, *Raising the Roof: California Housing Development Projections and Constraints, 1997–2020*, 7–1 (2000), prepared for the California Department of Housing and Community Development.[13]

The results found in *Pay to Play* are not unique to California. A study of housing prices in King County, Washington, came to exactly the same conclusion. Mathur, Waddell & Blanco, *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urb. Studies 1303 (2004).

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12 A copy of *Pay to Play* may be found on the internet at http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf.

13 A copy of *Raising the Roof* may be found on the internet at http://www.hcd.ca.gov/hpd/hrc/rtr/int1r.htm.

Based on recent census data and typical lending practices, each $1,000 increase in the price of a $100,000 house drives 420,000 households out of the home buying market. NAHB, *Determining the Numbers of Households Priced Out of a Market* (2004). Unwarranted exactions on development, which, sooner or later, translate into higher home prices, thus has a direct adverse effect on the nation's supply of affordable housing.

There is no practical way in which badly needed affordable housing can be provided unless the exactions imposed on new development are limited to those roughly proportional to the impacts created by that new development.

VII.

CONCLUSION

If, as Justice Holmes stated, "The life of the law has not been logic: it has been experience,"[14] then 20 years of experience with the application of *Williamson County*, culminating in the case at bar, should call for a searching reexamination of its continued viability. What apparently was intended to be a hurdle to be overcome has, at least in the Ninth Circuit, become a plaintiff's dead end. This Court has not been afraid to reverse itself when it has realized that its original decision was wrong. Compare *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

Developers in general, and the NAHB in particular, do not contend that new development should not be required to mitigate impacts created by that development. All that they ask is that they not be required to pay more than an amount roughly proportional to the impacts created – to not be required to do more than mitigate those impacts

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14 Oliver Wendell Holmes, *The Common Law* 5 (Mark DeWolfe Howe ed., Belknap Press of Harvard University Press 1963) (1881).

– which is what *Dolan* stands for. If all that is required to avoid the test of rough proportionality is to embody the exactions in a rate sheet which is ministerially applied, then *Dolan*'s promise is gutted.

> "[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions." *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998).

It is time that this Court answer that question.

Accordingly, the NAHB respectfully requests that the Court grant the petition for a writ of *certiorari* sought by the petitioners.

Dated: November 12, 2004 Respectfully submitted,

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